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YSP Podcast Transcript: Episode 352. How to sack underperforming committee members

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Intro: Welcome to Your Strata Property, the podcast for property owners looking for reliable, accurate, and bite-sized information from an experienced and authoritative source.

Amanda Farmer: Hello and welcome to this week's podcast episode. I'm your host strata lawyer, Amanda Farmer, and it's my job here each week to help you demystify the legal complexities of apartment living. Now, this week I am bringing you an edited version of one of my recent live chats held over on our Facebook page a few weeks ago. I was asked to cover off how frustrated owners might deal with underperforming or misbehaving committee members. As you'll hear me say, I am increasingly being asked this question. In particular, I'm asked "Amanda, how do we get orders from the tribunal removing committee members?" I walk through that process in this live chat. It was suggested at the time by one of the viewers who was tuning in on Facebook that the chat was so valuable it should be turned into a podcast episode. So here it is.

I'm directing you to some past tribunal cases, some practical approaches you may want to take before you head off to the tribunal, how to make a qualified request, forcing your committee to convene a general meeting, and I answer a question about whether or not owners can direct the order of motions on a meeting agenda. Now I am live over on the Your Strata Property Facebook page pretty much every Friday afternoon. Sometimes I'm in my home studio, sometimes I'm in the backseat of a bus. Sometimes I'm at a hotel bar as I was in Singapore last week. Whatever it takes to get this strata education to you. If you're not yet following us over on Facebook, just search Your Strata Property on Facebook and you'll find our Facebook page. You can choose to like or follow the page, and that way you'll get notified by Facebook whenever I am live. Links to the cases and the legislation mentioned in this chat are over in the show notes for this episode. Just head over to yourstrataproperty.com.au/podcasts where you'll see this episode number **352**. You can access the transcript and all of those important links.

I'll take you right on over now to my Friday live chat about how we deal with underperforming committee members. Enjoy.

Now let's move on to our topic of the day, which is how to sack misbehaving underperforming committee members? I am often asked this question, I'm being asked this question increasingly, and I think it may be because as I often say here, owners of strata apartments are becoming more aware, are becoming more engaged and more educated about their rights, their avenues for dispute resolution. The management of our buildings is also becoming more complex and more complicated. So there is a lot for not just our strata managers, but our committee members to be doing day-to-day. And some owners feel that their committee, their committee members, particular members, one, two, all of them are not quite cutting it and are not meeting their legal obligations, are not fulfilling their legal duties, acting in accordance with their functions. And owners want to know how do we get rid of these committee members?

And often I'm asked, "Amanda, how do we get an order from the tribunal removing committee members?" There seems to be a level of knowledge there among owners that it is possible to go to the tribunal and obtain an order that a committee member's position be vacated, but no one's quite sure, or those who have approached me haven't been quite sure how you go about it. And the most recent question that was asked, and this was from a member inside our member's Q&A forum. The question was, "What do you have to prove? What kind of misconduct would enable, would allow, would ground an order that a committee member be removed from their position?" And I was asked, "Amanda, can you provide some real life examples?" And my immediate response to that was, "Well, I don't have any real life examples. I have not been involved in, I'm going to say, a successful application to the tribunal to have a committee member removed."

And when I said about researching this topic, researching this question in the hope that I could point this owner to some useful cases, I was not able to find any reported case where the tribunal had made an order removing a committee member from their position, whether they're an office bearer or a non-office bearing committee member. I could not find a single case in New South Wales where that order had been made. And I do look this up from time to time when I'm asked that question, and that has always been the result that I've come up with. I still haven't got one of those cases. There may be unreported cases out there and I'd love to put the fishing line out to see if I get any bites back from lawyers, from owners who are listening, committee members, strata managers if you have been involved in a case where you have obtained an order that a committee member be removed from office,

please do send that through to me. I'd love to have a read of it and to share it with your permission with those who are tuning in.

I'm just seeing a comment here from Bill and Ben who says, "I tried and failed. The strata committee had enlivened the triggers, but the member would not touch it." Interesting. Okay, so I'm going to walk you through this process of attempting to have a committee member removed from office. I'm going to talk first to the section in our legislation and an application to the tribunal to have that removal. And then I'm going to talk about, if we look at these cases, as you will see and see that in the main they are unsuccessful and it is very hard to get one of these orders, then how might we go about dealing with committee members who aren't quite cutting it another way? What are some other options that we might have to improve the way in which our elected members of our community are representing us?

So the place where we start, if we're looking at an order from the tribunal to have a committee member removed is section 238 in our Strata Schemes Management Act. This is our New South Wales legislation. I know we have people tuning in from all around the country. If you are familiar with or are happy to share for me the relevant parts of your legislation, I know we have similar provisions across the country, I'd be very interested to hear what your legislation might say if you want to point me to it. But section 238 in our Strata Schemes Management Act says that, "The tribunal may on its own motion or an application by an interested person make any of the following orders." So this means that the tribunal on its own motion means that this order could be made removing a committee member even if nobody's asking for it.

If there's an application for something else to happen in a building like the repair or maintenance of the common property, and the tribunal sees that a committee member is behaving badly and meets the criteria in this section, the tribunal might just make the order removing the committee member. I must be very clear, once again, never seen that happen, but that's what on its own motion means. That doesn't have to be a specific application before the tribunal seeking the order. What would usually be the case and what we've seen in the reported cases is that there is an application by an interested person that is an owner or an occupier generally asking the tribunal to make an order, removing a person from a strata committee or making an order prohibiting a strata committee from determining a specified matter and requiring that that matter be determined only by resolution of the owner's corporation or an order removing one or more offices from their office. So that's removing the chairperson, the treasurer or the secretary. Those are the office holders in our strata committees.

Now, here's the important part here that we must all be aware of and start from. The tribunal may order the removal from office of a person if it's satisfied that that person has either failed to comply with this act or the regulations or the by-laws or has failed to exercise due care and diligence or engaged in serious misconduct while holding the office. Now, when you read that, I think in section 238, you think, "That's not really a high bar. All I have to show is that the person's failed to comply with the Act or some part of the regulations or they haven't complied with the by-laws. I don't necessarily have to prove a failure to act with due diligence or a serious misconduct because that's an or. It's not an and. I only have to prove one of those things." Some owners come to me and say, "We've got a secretary who doesn't issue meeting notices on time, doesn't have those statutory motions on the agenda for general meetings." That's a failure to comply with the Act. The tribunal should simply remove that person from office.

Well, it's not that straightforward, and the reason it's not that straightforward is because this section says may. It doesn't say must. "The tribunal may remove a person if it's satisfied that these things have happened." So even if you can prove that one or more of these things has happened, the tribunal member who's hearing your case then exercises their discretion and looks at all of the surrounding circumstances and thinks, is this really bad enough? In my view, is this really serious enough for me to make an order removing this person from their elected, this is the thing to bear in mind, their elected position. At some point at an AGM sometime ago, this person was elected by their fellow owners to stand in this committee position. The tribunal is very conscious of that.

That's our starting point, section 238, and we do have a few reported cases in New South Wales that have a look at how that section is applied. In none of these cases has the tribunal ordered the removal of a committee member. And I'm going to draw your attention to three of them today. We do have links to each one. If you want to go and have a read, they're fairly easy to read. And if you are thinking about this kind of application, if you are debating with fellow owners, strata managers, if you have an owner or a committee member who's talking to you about possibly these applications, then these cases may be helpful to point people to as I have been doing.

The first case I want to talk about is Lockrey and Rosewall. It is a February, 2022 decision, and this was where one owner sought the removal of a strata committee member from office because they said that person behaved so badly at an extraordinary general meeting. In that case, the allegation was that the committee member had threatened an elderly lady who was present at the meeting and had acted aggressively towards that person. There were allegations of bullying on this occasion, and ultimately the tribunal found that these allegations were not made out. There wasn't sufficient evidence to show that this committee member had in fact acted in a way that was threatening, that was aggressive, and that was bullying. The key part from a lawyer's perspective in reading this case is that the tribunal member said, "Compelling circumstances need to be demonstrated to justify the intervention of the tribunal and to override the democratic wishes of the owner's corporation."

And this tribunal member considering this case likened section 238, which is about the removal of a committee member from office, likened it to section 237, which some of you may know is about the appointment of a compulsory manager, the appointment of a compulsory manager and the removal of power from the owner's corporation and the owners. So the tribunal saw these two interventions on the same level. And you may know if you've been listening to the podcast for a while, if you've been coming to Friday Live, you would've heard me say a section 237 order to appoint a compulsory manager is treated very, very seriously by the tribunal and is an order that's only made in circumstances where you have highly dysfunctional owner's corporations. Now here we have the tribunal saying that you would need similar circumstances to remove a committee member from office because what you're doing is interfering with that democratic process where owners have elected their own representatives. So it's a serious measure that's not taken lightly is what we're told in this Lockrey case.

I'm just seeing a comment there from Jeffrey who's saying, "Where do I find the links?" So Jeffrey, the links to each of the cases are being posted here on Facebook, so you should be able to see in the other comments. There are links there. If you're still having trouble with those, Richelle and Mina will come around and help you with that. I'm just heading back to some of our earlier comments here on this topic before I move on to our second case that I wanted to bring your attention to. I can see a couple of comments here from Anna. Anna is saying, "I have a committee member that goes about thinking she's right about everything and everyone else is wrong." Yes, Anna, I think since you've posted that, I've taken you to section 238 and you've seen there that there needs to be some failure to comply with the Act or the by-laws, a failure to exercise due care and diligence or someone who is engaging in serious misconduct. So a know-it-all, and many of us know some of those people, a know-it-all probably wouldn't cut it with a section 238 application.

Oh, look, Jeffrey knows his law. Jeffrey has said 10 minutes ago before I said it, "NCAT sets a very high bar. The key is provable gross misconduct on a sustained basis. It's almost to the same level as seeking an order for compulsory appointment." Awesome. Yes, thank you for sharing that, Jeffrey. You're right on the point. I wonder, have you been involved in cases like this? And maybe the tribunal has said that in cases that you're aware of as well. I'd be interested to know more.

Okay. The next case that I wanted to draw your attention to where an owner, once again, was not successful in obtaining an order that a committee member be removed. That's a more recent case. That's laws and the owners of Strata Plan 97230, an August, 2022 case. At least these two are decisions of a single member of the tribunal. These are not appeal panel decisions and I don't think we have anything higher than that on this point. Once again, we've got the link to the laws case if you want to go over and have a read of it.

But in this case, the applicant owner was alleging that the committee member should be removed from office because of his bad behavior. She said that meetings had not been called, the roles of chairperson, secretary and treasurer had not been filled, or if they had, she didn't know about it because nothing had been recorded. The owner was complaining that there was no transparency from this committee member and she said that this committee member had trespassed on her property, had used her water without her consent, had fenced off an area of common property so that the committee member's dogs could play in it, and that he had acted in a way that was intimidating towards her.

And this is directly from the decision. The tribunal found that none of the allegations, even if they were proven, would support a finding that this committee member had failed to exercise due care or diligence or had engaged in serious misconduct. So none of those things that I just talked about, trespassing on the owner's property, using an owner's water, taking parts of the common

property for their own use, not appointing office bearers, none of that from this tribunal member's perspective would constitute serious misconduct sufficient to have this committee member removed. There was a lot of conflict in this case between these two people in particular, some family member disputes about parking on common property. But all in all, the tribunal was not satisfied that any of these were grounds to remove the committee member from their position and the tribunal declined to make the order sought.

Now, having heard some of these examples of things that don't constitute serious misconduct or a failure to act with due care and diligence and don't give the tribunal grounds to make these orders, you might be thinking, "Well, what does? What level of bad behavior is required for a section 238 order removing a committee member to be made?" And I have been involved in a case which was settled where a committee member had been working behind the scenes, I think it's fair to say, and there was documentary evidence about this behind the scenes to try and force an owner to sell their property and essentially to leave the building because it was thought by this committee member that this owner was causing a lot of trouble. And this committee member had written emails to their fellow committee members saying, "Look, we need to keep this up. We need to continue down this path because at the end of the day, we want this person to sell and leave."

And it was a path that was clearly problematic. I'm going to say, I won't say illegal, a path that was problematic and really called the conduct of the committee as a whole into question. There was this particular committee member where there was evidence of them inciting that behavior. I think that level of misconduct and clearly evidenced in writing would be a good example where an order might be grounded, where a committee member is being told by their professional advisors like their strata manager or their lawyer, "Hey, you need to be doing this. You need to be holding meetings. You can't approve that invoice. You can't try to amend a by-law or pass a by-law. That needs to be done at a general meeting."

This committee member's being told all of these things and they are hearing that advice, acknowledging that advice and choosing to act in a way that directly contradicts that advice or ignoring that advice saying, "Thanks, strata manager. Thanks strata lawyer. I don't care. I'm just going to break the rules anyway even though I'm aware of them." That kind of conduct, I think, would be more likely. Not guaranteed, but more likely to ground an order under this section.

Moving on to the final case that I wanted to bring to your attention on this point, that is the case of Linney and the owners. That's the owners of strata Plan 11669. It's a 2021 case. It was the December 2021, and this is where the tribunal said that, "Even if you can prove a failure to comply with the act, there's been a failure to comply with by-laws, there's been a lack of due care and diligence, there has been serious misconduct." Even if you can prove all of those things, the tribunal said, "The applicant for the order must still satisfy the tribunal, that these matters are of sufficient magnitude to justify the tribunal exercising its discretion." Remember that word may. The tribunal may make an order, but it may not. The tribunal exercises its discretion to remove a strata committee member. So even if you can prove those section 238 points, it's still up to the tribunal to see that the bad behavior is of sufficient magnitude to justify removing the committee member from office.

This was a case where there's a list, it's quite a helpful list, of allegations that were made by an owner against their secretary. The owner said that the secretary should have chaired the AGM and they didn't. The strata manager did. The secretary actively participated in excluding the owner from the AGM. There was an allegation that the strata role wasn't kept properly, that the committee was not keeping minutes of its meetings and wasn't providing them to the applicant for the owner who applied for the order on request. There was an allegation that there was a delay in convening the AGM. The owner applying for this order said that, "I didn't get notice by email or post that there was going to be a strata committee. I didn't get copies of strata committee meeting minutes." The committee refused to participate in mediation and that was said to be a breach of their duties.

The applicant had submitted motions for a general meeting and her motions were not put on the agenda. The way in which the motions were later put on the agenda, the motions were positioned in a way that the applicant said were prejudicial to her and the owner's corporation had failed to comply with its duty or there was an allegation the owner's corporation failed to comply with its duty to repair and maintain the common property. So that's a list of complaints. A fairly long list of complaints that this owner made specifically against the secretary on the committee.

Some of those kinds of complaints might be familiar to you. I've heard from many of you over the years listing similar complaints. But the tribunal said in this case, none of those things were sufficient to remove that committee member from office by way of a section 238 order.

So very high bar being set here by the tribunal. If you are hoping to obtain an order to remove a committee member. If you've heard all of this and you said, "Oh Amanda, I thought this is going to be a great idea. I could apply to the tribunal, get my order and get rid of this person who I don't think is acting in the best interest of the owners and who is not meeting their duties." But having heard what I've said, not sounding like such a great idea, I can tell you there's a series of cases that are reported where section 238 orders were sought as part of other orders often as part of a compulsory appointment, and that part of the application gets dropped. It gets dropped because of legal advice perhaps that's obtained by the owner or the tribunal in earlier directions hearings starts to hint that this 238 order is just not going to be made. So we have a whole series of cases where you'll see that 238 orders were originally sought and then the applicant just gives up on it because it's looking too hard.

Another reason why 238 orders would be dropped is because an AGM comes up and the difficult committee member that you've been wanting an order to get rid of is actually not reelected by owners, is not reelected or chooses not to stand for election again. Now this is one of the solutions outside of the tribunal that you can and I suggest you should turn to first before trying to involve the tribunal in your dispute. So you do have the opportunity to ask owners in general meeting to pass a special resolution to vacate the committee member's position, whether it's one committee member in particular or whether it's all committee members because you think your committee is just bad and dangerous. You can in general meeting pass a special resolution vacating all positions. So if you have the support of the majority of owners, super majority of owners present and voting at a general meeting, you can actually specially resolve to achieve the same end, getting rid of your committee members.

It's something that if you can issue a qualified request to convene a general meeting, you should do that as a first step to test the waters and see if there is appetite within your community to actually remove committee members from their offices. That should be your avenue if you can get that general meeting convened. And I appreciate if you're a lone voice there, you don't have the power to convene or to request that a general meeting be convened. You need more numbers than just you.

If an AGM is coming up, an AGM is coming up in a few months' time, and this is usually the advice that I land on when I'm talking to owners in this situation. If an AGM's coming up in a few months' time and the committee that was elected at the last AGM has not been delivering on what they should be, haven't been complying with the Act, haven't been complying with the by-laws, haven't been acting with due care and diligence and in the best interest of all owners, then it's time, a few months before the AGM, to start campaigning for a changing of the guard and to get together a group of owners that you believe is going to better serve the community and to make sure that they are nominated for election and to make sure that you have the majority vote.

It's only an ordinary resolution to elect committee members. You have the majority vote for your team that you've put together or that you are supporting and you have that new committee elected. That's the way you do it without involving the tribunal and if you don't have the power to convene a general meeting by way of a qualified request. You've got to do it at the next AGM.

So if you can live with it, if you can live with these difficulties until the next AGM, I would always suggest that your time, your effort, your energy, rather than putting it into litigation, which can go for years and can run past AGMs, your time, effort, and energy should be put into campaigning for change within your community, for your community to vote for change rather than involve the tribunal.

I'm going to head back to some of these comments here because I think we have some insights which are worth sharing here. Sean is saying, "What is the ruling about placing owner's motions on the notice? Can the owner direct the sequence or is that the role of the secretary?" Yes, Sean, good question. So Sean's just picked this up from a comment that was made in relation to the Linney case. So an owner had complained that the secretary, I think it was the secretary in that case, had not put their motions on the agenda. Then when they did finally put the motions on the agenda, they set them out in a way that the owner said was prejudicial to what they wanted to achieve. This is a common complaint as I know you know, Sean, being a strata

manager, I see it with my clients. My short answer is it's up to the secretary. It's up to the secretary to lay out the motions the way that they see fit. That is part of their functions to put together the agenda for a general meeting.

Sometimes it's obvious the way that motions should go. If one fails, then the other one should be put. And sometimes we can, as lawyers, draft motions in that way that this motion is only relevant if the proceeding motion fails and then of course they should go in that order. But otherwise, yes, I know this is a source of conflict for owners where their motion just will lose its steam if it's put in a certain place in the agenda. But yes, in my view, it is up to the secretary how they lay that out.

Okay. Scrolling down these comments. I'm just trying to pick up comments from those I may not have acknowledged yet or been given the opportunity to have their questions answered. Glen is saying, "Can owners call an extraordinary general meeting to vote in a new committee rather than wait for an AGM which could be months away?" Great question, Glen, and I've kind of alluded to this in the sideways way. The only way that owners can force a general meeting is if they make what's called a qualified request. And a qualified request is made by owners who hold at least 25% of the total unit entitlement. Owners who hold at least 25% of the total unit entitlement can send a notice to the secretary demanding that a general meeting be called.

And then the secretary must do that. I think it's within 10 days, might be 14 days. 10 days of receiving that request, the secretary must convene the general meeting. So the only way that owners can force on a general meeting is if they together hold 25% of the total unit entitlement. So as I said earlier, if you're a lone wolf there or there's only a couple of you in a big building, you won't have the power to force on a general meeting.

And then as for the motion at that general meeting, electing a new committee, what you'd have to do is propose a motion that all committee positions be vacated. And once that happens, then the new committee is elected. You can do that at the same meeting. The motion to vacate all committee positions can only be resolved by special resolution. So if you're trying to spill the committee outside of an AGM, which is when otherwise committee positions do automatically vacate, if you're trying to spill the committee earlier than that, then you need a special resolution to be able to do that. That's in our legislation. And Jeffrey's correctly saying that the secretary has the right at any time to convene a general meeting for sure. I suppose if the secretary's position was being challenged or their fellow committee members are under fire, you might find it hard to convince the secretary to convene that meeting. So you would have to have sufficient unit entitlement on your side to issue a qualified request.

Bill and Ben's asking, "Do you think it's right that it takes an ordinary resolution to elect them, but a special resolution to remove them?" Good question. I haven't really thought about that, Bill and Ben, but I will. I'll have a think about that. I suppose removing someone from their office is a serious thing to do. Electing someone to office is a serious thing to do too though, isn't it? Good question. We shall ponder that one.

Anna's saying, "The person in my situation, people don't speak up at the AGM, however, do tell me all their problems through the year." Oh, Anna, if I had a dollar for every time I heard that. Yes. And you know what? Sometimes it just takes that one person to take up the challenge, to be the hero, to be the champion. I see this all the time in communities where one owner will say, "Hey, this isn't right. Why am I the only person noticing this?" And then if that person is brave enough, informed enough to stand up at a meeting and call out the behavior, I've been in these meetings where then the others, the silent majority behind them suddenly start going, "Oh yes, me too. Oh me too." And vote in favor for example, of a motion that something happen or something doesn't happen.

But it takes that one person to put their name to it, to stand up, to be the representative, to be the hero, to be the champion, as I said. And as long as the others have that person to stand for them, then they will follow and they will be happy to quietly stand behind that person who is their spokesperson. I've seen many communities where owners have accepted that and said, "All right, well I'll be the person." Sometimes they hire somebody like me to be the person. And it's amazing to watch the human behavior then where others who have been suffering have been thinking the same thing, but haven't been brave enough to stand up. Once there is someone who is willing to take the first step, then they do become braver and they are willing to support you.

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Dawn is saying, "Owner apathy is a problem." Yes, absolutely. And that's why this process of campaigning before a general meeting to bring to the attention of other owners who may have been disengaged, who may be overseas, who may be investor owners and not really aware of what's going on in the building, this process of campaigning is really important. You can't just expect, I think, to turn up at a general meeting and say, "Hey, we need a whole new committee because these guys don't know what they're doing." That can't be the first time that your fellow owners are hearing about that. They need to be made aware in a carefully crafted way, let me say. We have to be very careful not to be defamatory. If we're sending around circulars or campaign letters or newsletters, whatever you want to call them, agitating for change. We have to be careful not to be making defamatory allegations about things people have or haven't done.

But you absolutely need to be bringing failures to comply with the act, breaches of the by-laws, misconduct failures to Act with due care and diligence where they are clear and obvious and you are able to point to a motion or a failure to resolve, a failure to repair and maintain common property, poor decision making. You need to lay that out and prepare owners that this is why you are agitating for change at the next AGM.

Olivia is saying... Oh, I think Olivia took the words out of my mouth. "You'll need to be actively looking for people to support you. There's no easy way, but change takes effort." Nicely said, Olivia. Thank you. Colleen's here saying hi. How you doing, Colleen? All right, so great chat. I'm interested, Jeffrey, if you think this is a chat sufficient to be converted into a podcast episode so that we can get that transcript of the chat as you were asking earlier. I'm just going to scroll back up actually too because I know Jeffrey, you had a few other comments. Jeffrey's saying, "Sometimes the best option is to obtain as many proxies as legally possible across as many owners as possible to obtain a majority vote and remove all or the bad behaving person and replace with owners preferred." Yes. Well, it's definitely a way. It's definitely a way to do it, Jeffrey. And it may be for people like Anna, who I can see is struggling to get support, having a few people who are willing to hold proxies and willing to vote for necessary change, then that might be a way to do it. Anna's saying "Definitely a podcast would be great!". Hi Denise, thanks for saying hi.

Alright guys, now, it's almost five o'clock on a Friday afternoon. We are moving into the weekend. Next week, I will be back in big smoke. Next week, I got a couple of meetings. Valentine's day on Tuesday next week, is anybody doing anything nice for Valentine's Day? I think I'm going to a strata meeting on Valentine's day which is very romantic. Look, if I'm at the meeting as a strata lawyer, there, representing an owner, I don't think love is in the air. Let me say that it'll be an interesting Valentine's day for that building.

Outro: Thank you for listening to Your strata Property, the podcast which consistently delivers to property owners reliable and accurate information about their strata property. You can access all the information below this episode via the show notes at www.yourstrataproperty.com.au. You can also ask questions in the comments section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?